No. 15,740

IN THE

United States Court of Appeals

For the Ninth Circuit

JACQUES ARTHUR GUBBELS,
Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,
Appellee.

APPELLANT'S REPLY BRIEF.

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I.

(a) THE WORDS USED IN THE DEPORTATION STATUTE CANNOT BE INTERPRETED AS EMBRACING PROCEEDINGS OF A COURT-MARTIAL.

Appellee's brief does not touch the real issue in this case. The question is simply one of interpretation of the deportation statute (8 U.S.C. 1251(a)(4), (b)). The test to be applied in that interpretation has been settled by the Supreme Court of the United States: The interpretation must be "that which is required by the narrowest of several possible meanings of the words used" (*Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433).

Do the words of the statute in their "narrowest" meaning necessarily include judgments of a court-martial?

This is the sole question with which we are confronted in this problem of interpretation of the deportation statute.

It may help to get down to the nub of the matter by stating what is *not* involved. The power, authority, and jurisdiction of the court-martial is not in question. The finality of its decisions is not disputed. The legality of its proceedings is not under attack.

Appellant simply contends that the use of the word "court" in the deportation statute does not by the "narrowest" meaning of that word include a court-martial. The situation is strikingly similar to that involving use of the word "court" in a criminal statute, exemplified by the case of *Todd, et al. v. United States,* 158 U.S. 278, 15 S.Ct. 889. In that case the statute (R.S. Section 5406) punished any person who might injure a witness for having testified to any matter pending in a "Court" of the United States. It was held by the Supreme Court that injuring a witness who had testified in a preliminary examination before a Commissioner was not within the purview of the statute. In that case the Court said:

> "While a preliminary examination may be, in the strictest sense of the term, a judicial proceeding, yet the language of the statute is not broad enough to include every judicial proceeding held under the laws of the United States."

In that case the Supreme Court cited with approval the earlier case of *United States v. Clark,* 1 Gall. 497, Fed. Cas. No. 14804, in which the indictment was for perjury on a preliminary examination before a Judge of the United States District Court under a statute which punished perjury in any suit, controversy, matter or cause depending in any of the "courts" of the United States. In the *Clark* case, the Court said:

> "The statute does not punish every perjury but only a perjury done in a Court of the United States. Primarily, therefore, it is of the essence of the offense that it should be charged as committed in such court."

The conclusion was that perjury before a judge on a preliminary examination was not perjury in a "court" of the United States within the meaning of those words in the criminal statute then under consideration.

In those cases, the statutory reference to a "court" was so narrowly construed that even proceedings before a Judge or Commissioner sitting in a magisterial capacity were held not to be included within the operation of the statute. Similar tenets of strict construction apply here (*Fong Haw Tan v. Phelan,* supra), and certainly there is far less reason to interpret the reference to "the court" in the statute here under discussion as including a court-martial.

Appellee does not attempt to contend that the word "court" includes a court-martial when used in the ordinary sense in legislative enactments, but he does

say that such tribunals "are judicial in nature" and perform a "judicial function." But this is simply a play upon one of the several meanings in which the adjective "judicial" is used. This becomes eminently clear from an examination of the decision on which appellee places his principal reliance, viz., *Runkle v. United States* (1887), 122 U.S. 543, 557, 7 S. Ct. 1141, 30 L.Ed. 1167. In that case the question was whether the President could delegate a duty imposed upon him by statute to review court-martial proceedings in certain cases and approve or disapprove the action of the military tribunal. The court held that this was not an act which the President could delegate to a subordinate because the action required is "judicial in its character, not administrative" and "his personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself." Here the court was using the word "judicial" in a sense in which it is frequently used, as distinguishing action of an officer or tribunal which requires personal judgment in contradistinction to ministerial or administrative actions. As stated in 50 *Corpus Juris Secundum,* page 565:

> "The term 'judicial act' is employed in law in two distinctly different senses * * * one, a broad sense indicating an act in the performance of which discretion and judgment are to be exercised; the other, a more technical sense, relating to an act of the judiciary * * *.
>
> "When the term is employed in its broad, general meaning, it is the nature or quality of the

> act which determines whether it is judicial and not the character of the person or instrumentality authorized to perform it. So used, it means official action which is the result of judgment or discretion; an official act in the performance of which it is necessary to consider and pass on evidence, and to arrive at a determination with respect thereto * * *."

The reference in the opinion in the *Runkle* case to a court-martial acting judicially and to "acts of a court," upon which appellee appears heavily to rely, is actually quoted from an opinion of the Attorney General (11 Opn. Attys. Gen. 19, 20-21), and if the language of that opinion is examined, it is definitely shown that the Attorney General was using these expressions to indicate acts involving discretionary determinations of fact and of law, as distinguished from administrative actions. In that opinion the Attorney General said: "I have quoted article 20th because it shows that Congress intended that the official who is authorized to approve and confirm the sentence of the court-martial under this Act, in revising its proceedings should act *judicially*—THAT IS, THAT HE SHOULD EXERCISE THE DISCRETION CONFIDED TO HIM WITHIN THE LIMITS OF THE LAW."

Of course a military tribunal, when acting in a matter within its jurisdiction, acts "judicially" in this sense, and in the sense that its decision carries finality and is impervious to collateral attack. Many other commissions, boards, officers, and other tribunals

also act judicially in that sense in adjudicating matters which fall within their jurisdiction, and their decisions may be just as impervious to collateral attack. Yet this does not make them a part of the judicial branch of the Government, nor does it make them "courts" within the meaning of a statutory provision which contains the word "court" without more.

Nor are the "dignity and finality" of judgments of the court-martial system in question here. We do not question the conclusiveness of the military tribunal's action in this case, nor the propriety of its procedures. The adequacy of the procedural safeguards which Congress has prescribed in court-martial proceedings is not in dispute. Congress has made similar provisions in connection with other types of proceedings before other types of tribunals which are not "courts" in the usual sense. None of these considerations so touched upon in appellee's brief reaches the real question which is whether Congress in the deportation statute in referring to a "court" intended to include a military tribunal.

> "Thus indeed, strictly, a court-martial is not a *court* in the full sense of that term, or as the same is understood in the civil phraseology. It has no common law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the 'Courts of the United States' have any application to it; * * * it is indeed a creature of *orders,* and except in so far as an independent discretion has been given it by statute, it is as

much subject to the orders of a competent superior as is any military body or person."

Vol. 1, *Winthrop's Military Law and Precedents* (2nd edition) page 54.

As recently as last term, the Supreme Court of the United States said

"Courts-martial are typically *ad hoc* bodies appointed by a military officer from among his subordinates * * *. In essence, these tribunals *are simply executive tribunals* whose personnel are in the executive chain of command." (Italics added.)

Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222, 1241, 1 L.Ed. (2d) 1148.

The foregoing decision is in line with many others wherein the Supreme Court of the United States has had occasion to point out and emphasize the fact that courts and military tribunals are generically different, notwithstanding the fact that each may be supreme in its own jurisdictional field.

Duncan v. Kahanamoku, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688;

In re Vidal, 179 U.S. 126, 21 S.Ct. 48, 45 L.Ed. 118;

Yamashita v. Styer, 327 U.S. 1, 66 S.Ct. 340, 344, 90 L.Ed. 499.

In enacting statutes of general application, Congress itself has not regarded military tribunals as being included within the word "courts": For example, in the Administrative Procedure Act (5 U.S.C.

1001(a)), the statute defines "agency" as each authority of the Government of the United States *other than* Congress, *the courts,* or the governments of the possessions, territories or the District of Columbia, but in the same section Congress found it necessary to use additional specific language to exclude agencies such as "courts-martial and military commissions."

It would seem to be self-evident that the language of the deportation statute here involved does not encompass proceedings before military tribunals within its scope, particularly since the words of this statute must be given their narrowest interpretation. On the contrary, it would be necessary to stretch the language far beyond it ordinary meaning to sustain the deportation order involved in this case. The plain fact is that a military tribunal is not a court as that term is used in a general statute of this sort, and dissertations as to the general powers of such bodies are wholly inapposite to the question here presented.

(b) THE PROVISION REGARDING RECOMMENDATION OF THE COURT CANNOT RELATE TO MILITARY TRIBUNALS.

Appellee's argument regarding subdivision (b)(2) of the statute is based upon two major misconceptions. First, he undertakes to assume that appellant's contention is "that said machinery is defective." There is no such contention. Appellant's contention is that the subsection can and does relate only to a court and not to a military tribunal, i.e., that military tribunals were not in contemplation of Congress

in enacting the statute. Furthermore, appellee's hypothesis that a court-martial could conceivably and practically exercise the statutory power to preclude deportation, loses sight of several concomitants of that statutory power, viz.:

1. The power must be exercised by "the court";

2. The power is self-executing and conclusive. Although referred to as a recommendation of the court, it is a positive adjudication which precludes the executive from deporting the accused;

3. The power can only be exercised within thirty days after first imposing judgment or passing sentence. This time limitation is mandatory (*U.S. ex rel. Klonis v. Davis* (CA 2) 13 F.2d 630);

4. Within that period there must be notice to the United States Immigration and Naturalization Service and opportunity for it to be heard by the court before such recommendation can be made.

With the foregoing limitations of the statute in mind, the best proof that military tribunals could not be in contemplation is appellee's concession at page 16 of his brief that in the court-martial procedure "the powers of the ordinary criminal court are split among the court-martial, the convening officer, and appellate authorities." We would also point out, as the Supreme Court of the United States has recently observed, that members of the armed forces of the United States are now stationed in sixty-three foreign countries in which these *ad hoc* military tribunals are convened from time to time. From the very nature of the problem, it is difficult to see how

the provisions of subsection (b)(2) of the statute could possibly be carried out if military tribunals are considered to be within its scope. The time limit alone would seem to make such a course impossible of application to such proceedings; the nature and function of the tribunal would seem to be incompatible with the thought that it should exercise this statutory prerogative; and certainly there is no indication of an intent to include military reviewing authorities within the words "the court" in that subsection, nor is it claimed that any provision for such a procedure has been made in any of the regulations pertaining to procedures of military tribunals. In short, we submit that subsection (b)(2) of the statute cannot be reconciled with the hypothesis that proceedings of military tribunals are within the scope of the deportation statute. It is reasonable to assume that if Congress had so intended, there would be words which would make that intention clear, including some workable provision whereby the exclusionary benefits of subsection (b)(2) would be implemented in cases involving military personnel tried by military tribunals. It is perhaps superfluous to observe that so harsh a consequence as deportation should not be permitted to rest upon an ambiguity, and certainly an intention to have such tribunals function as "the court" in making the statutory adjudications prescribed by subsection (b)(2), supra, as to whether or not aliens shall be deported cannot be attributed to Congress on the basis of the language used.

(c) THE INTENTION OF CONGRESS TO INCLUDE COURT-MARTIAL PROCEEDINGS DOES NOT APPEAR.

The attempt to apply the deportation statute, as now written, to individuals who may have been found guilty of infractions by military tribunals of the United States armed forces in any of the sixty-three countries of the world in which such armed forces are now stationed, presents such anomalies that there would seem to remain no question as to the inapplicability of the statute to such situations. Apart from the practical impossibility of applying the present subsection (b)(2) to court-martial proceedings, there are other obvious difficulties. A soldier may be convicted of infractions which in civil life would amount to no more than a civil wrong or which might be treated as a juvenile delinquency rather than a crime, and if two separate charges were involved, the soldier would be subject to deportation regardless of whether or not any punishment was imposed by the military tribunal. We have pointed out that at least up to the enactment of the Immigration and Nationality Act of 1952, the administrative authorities found it impossible under the law to sustain deportation in cases of members of the United States armed forces convicted on foreign soil by court-martial, since the statute at that time used the words "in this country" with reference to deportation on the basis of convictions of crime. If that situation has changed, it would be necessary to hold that the mere omission of the words "in this country" from the present statute was intended to bring such court-martial cases

within the ambit of the statute. Certainly this would be a far-fetched deduction. It is much more likely that the words "in this country" were regarded as unnecessary in view of the definition of the word "entry" which was being written into another portion of the statute. Certainly an intention to subject resident aliens to deportation on the basis of proceedings of military tribunals should rest upon a more definite expression of Congress.

II.

APPELLANT HAS NOT BEEN CONVICTED OF TWO CRIMES INVOLVING MORAL TURPITUDE WITHIN THE MEANING OF THE DEPORTATION STATUTE.

While the first charge of violation of Article 121 of the Uniform Code of Military Justice (50 U.S.C., former Section 715) specifies that appellant did "steal" a pistol which was the property of the United States, it is not otherwise indicated which of the two sections of that article was violated. As pointed out in appellant's opening brief, it is conceivable that a soldier could be convicted under this particular article for infractions which in civil life might amount to no more than a civil wrong, or at least an infraction lacking in the elements of baseness and depravity necessarily involved in the concept of moral turpitude. The Attorney General's holding in *Matter of P——*, Vol. I, Admin. Dec. under Immigration and Nationality laws, page 33, (erroneously misprinted in appellant's opening brief as page 3) is pertinent here. In

that case the court-martial had found, and the subject admitted, that he had stolen money from another soldier. The Attorney General was unable to find that he took it with criminal intent or that respondent's conduct in the army would have constituted a civil crime under Italian law.

This difficulty constitutes another reason for doubt that the provisions of the deportation statute are intended to be applicable to persons convicted under military law by military tribunals, since conduct which under military law might constitute a criminal offense could amount to something less if civil law were being applied by a civil tribunal.

III.

CONCLUSION.

It would stretch the bounds of the language of the deportation statute to interpret it as applying to judgments of military tribunals. As the Supreme Court of the United States has held, deportation of a resident alien is in the nature of a forfeiture or penalty and the statutory provisions therefor must be construed in their narrowest sense. So construed, it would appear to be impossible to interpret the present statute as being designed to deport military offenders tried by a court-martial. Because of the seriousness of the consequences and of the problems involved, the intention of Congress to bring about such a result would require language much less ambiguous

and uncertain in that regard than is contained in the present statute.

We respectfully submit that the decision of the court below was erroneous and should be reversed.

Dated, San Francisco, California,
March 6, 1958.

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